Supreme Court of the United States.

OF THE OCTOBER TERM, A. D. 1873.

EDWARD DUPASSIER, *Plaintiff in Error,* v. ALBIN ROCHEREAU, *Defendant in Error.*	No. 359. *Error to Supreme Court of Louisiana.*

ARGUMENT OF A. C. STORY,

FOR PLAINTIFF,

ON THE MOTION BY DEFENDANT TO DISMISS THE WRIT OF ERROR

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1873.

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Plaintiff in Error,
v.
ALBIN ROCHEREAU,
Defendant in Error.

No. 359.

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ARGUMENT OF A. C. STORY, FOR PLAINTIFF, ON THE MOTION BY DEFENDANT TO DISMISS THE WRIT OF ERROR.

STATEMENT.

On June 12, 1852, one Pierre Sauve executed a mortgage upon a plantation, and certain other property thereon, situate in the parish of St. Charles, Louisiana, to one Charles Anderson Jacobs, to secure the sum of $133,120, with interest, part of the purchase money of said mortgaged property, the last note falling due five years after said date, with seven per cent. interest.

This mortgage was passed before a notary public of New Orleans, and thus became an "authentic act," importing, and in terms, authorizing a *confession of judgment* in any court of competent jurisdiction. It was "inscribed," or recorded, in the mortgage office of said parish, July 8th, 1852.

On the 26th day of February, 1858, said Sauve, executed a *second mortgage* to the defendant in error, upon the same property, before the same notary, to secure the further sum of $35,000, due one year after date, with interest at 8 per cent., which was recorded March 20th, 1858. This second, or Rochereau mortgage, contained the following recital:

"According to the annexed certificate of the recorder "of mortgages of the said parish of St. Charles, the said "plantation and slaves are *free from incumbrance with the* "*exception following*, to wit:

"1. *The mortgage granted by the said Suave in favor of* "*C. A. Jacobs*, by act in this office, on the 12th June, "1852, to secure the payment of $133,120, now reduced, "according to the records of said recorder, to $55,120, of "which $26,000 have been paid, as the said Sauve hereby "declares." (Record, p. 14.)

On Oct. 15, 1858, Jacobs brought suit in the third judicial district court of Louisiana against said Sauve, upon the $29,120 note mentioned in said first mortgage, and after citation he was ordered to pay the amount thereof into the hands of the sheriff, subject to the further order of court. (Printed Record, pp. 45, 51.)

On April 5th, 1861, the *Jacobs or first mortgage* was, by an "authentic act" of subrogation, executed before the same notary, transferred by consent of said Jacobs and Sauve to Edward Dupassier & Co., who received said note by indorsement in due form, and paid to said Jacobs the amount unpaid on said note and mortgage, and allowed Sauve one year's credit thereon, said mortgage to remain in full force and virtue the validity and effect thereof to be unimpaired thereby. (Record, pp. 50,51.)

On December 1st, 1863, said firm of Dupassier & Co. filed petition and bond against said Sauve, *in the United States Circuit Court for the District of Louisiana*, among other things, setting forth the execution of said note and mort-

gage, and praying for a writ of sequestration against the crops and other movable property upon the plantation in question; for citation against said Sauve and for judgment against said Sauve for $37,011.99, with interest and costs and a special mortgage *with vendor's lien and privilege* upon said plantation and property, by preference over all other creditors, etc.

Said notes, mortgage and proceedings in said third judical district court, were annexed. (Rec., pp. 39 to 52.)

The writ of sequestration issued in this case, and the marshal returned that he had seized the property, but was prevented, by military authority of the United States from retaining possession under his seizure, and was driven away (Rec., p. 53).

On Feburary 23d, 1866, by judicial confession of the defendant, Sauve, in open court, a judgment was rendered in said cause in favor of said Dupassier & Co., against said Sauve, for $37,011.99, and interest at 8 per cent. from 5th April, 1862, till paid, and costs of suit *with vendor's lien and privilege* upon the property in question. (Rec., p. 54.)

On the same day a writ of *fieri facias* was issued upon said judgment, under which said *plantation was seized* and taken possession of by the United States Marshal for said district, and notice and demand of payment served on said Sauve (pp. 55 56) and on 5th May, 1866, the said plantation was sold by said United States Marshal under said writ for the sum of $64,151, to the plaintiff in error. The purchaser deducted the amount of his judgment and interest, and paid the balance of $15,046.05 into the hands of the marshal and received a deed of conveyance of the property, from the marshal which was recorded May 23d, 1866 (Rec., p. 33.)

This sale was confirmed and the surplus money was ordered paid into the Registry by the United States Court, May 22, 1866. (P. 56.)

On the 26th day of February, 1858, said Sauve, executed a *second mortgage* to the defendant in error, upon the same property, before the same notary, to secure the further sum of $35,000, due one year after date, with interest at 8 per cent., which was recorded March 20th, 1858. This second, or Rochereau mortgage, contained the following recital:

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On December 1st, 1868, said firm of Dupassier & Co. filed petition and bond against said Sauve, *in the United States Circuit Court for the District of Louisiana*, among other things, setting forth the execution of said note and mort-

gage, and praying for a writ of sequestration against the crops and other movable property upon the plantation in question; for citation against said Sauve and for judgment against said Sauve for $37,011.99, with interest and costs and a special mortgage *with vendor's lien and privilege* upon said plantation and property, by preference over all other creditors, etc.

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This sale was confirmed and the surplus money was ordered paid into the Registry by the United States Court, May 22, 1866. (P. 56.)

No attempt was ever made to reverse this judgment, but *Rochereau appeared in the Circuit Court, and asked to have this money applied on his second mortgage.* (P. 16.)

A case directly in point, *Patterson* v. *De La Ronde*,(1) was decided about this time, and in order to avoid its effect, Rochereau, before any distribution was made, filed suit in one of the State courts of Louisiana, against Dupassier, alleging that he was in possession of the property as owner, asking that *he* be ordered to pay $35,000 and interest at 8 per cent.; also five per cent. on principal and interest, besides costs, or give up the property. (Rec., p. 2.) Sauve was not made a party. *Dupassier answered, pleading to the jurisdiction of the State Court the proceedings had in, and sale to him through the United States Circuit Court, and the pendency of Rochereau's application for the surplus* money. He also specifically set forth the existence of the civil war, which prevented the efforts made by him to reinscribe the mortgage, and specifically traced and claimed title to the property, *free* of all liens, under and by virtue of said sale *by authority of the United States Court.* That the claim of Rochereau *was extinguished* by the judgment and proceedings had in that court, and he annexed the marshal's deed to his answer. (Rec., p. 16, 17.)

The State court entered a decree ignoring the proceedings in U. S. Court and Dupassier's title, and recognizing the mortgage of Rochereau as paramount. Dupassier appealed to the Supreme Court of that State, where the judgment was affirmed.(2)

The case may be more briefly stated thus: Rochereau, in his petition in the State court, alleges "that Dupassier *has taken and holds possession of said plantation as owner.*" Dupassier *alleges and proves* that *this ownership* is solely

(1) 8 Wall., 295. (2) 22 La. Annual Rep., 402.

derived *from the United States Circuit Court*, through a sale under a judgment therein *confirmed by that court.*

The State court decided *against the title of Dupassier*, and held the title of Rochereau to be paramount.

The jurisdiction of this court is therefore *complete, and has been so decided.*(1)

Dupassier brings this writ of error to reverse that decision, and for a restoration of his property, of which he has been deprived by means of it.

ARGUMENT.

The Constitution of the United States *ordains* that "this constitution and *the laws of the United States* which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, *shall be the supreme law of the land;* and the judges in every State shall be bound thereby, anything in the constitution and laws of any State to the contrary notwithstanding."(2.)

The act of Congress of 26th of May, 1790, provides that "The records and judicial proceedings of the courts of any State shall be proved or admitted in any other court within the United States. And the said records and judicial proceedings* shall have such faith and credit given to them in every court within the United States as they have by law in the the courts of the State from whence such records shall be taken,(3) and the rule equally applies to the United States Courts.(4) Indeed the act of March, 1804, in express terms makes it applicable to

(1) Clements v. Berry, 11 How., 398.
(2) Constitution U. S., Art. VI., Sub 2.
(3) 1 Stat., 122, Brightly, 265.
(4) Tooker v. Thompson, 3 McLean, 94; Buford v. Hickman, Hemp., 232.

the "judicial proceedings, courts," etc., of the United States.(1)

These are salutary provisions which the Federal courts have ever jealously upheld; without them no suitor's rights acquired in Federal courts would be safe in any State court. The present case is a conspicuous evidence of their necessity and importance. But the learned counsel for the defendant in error seeks to avoid the effect of the decision complained of. He claims that full credit and faith was given by the State court to the decree of the U. S. Circuit Court, and our title thereunder, so far as relates to their validity in point of form. That the decree simply denied *their legal effect* as against Rochereau.

This position is manifestly fallacious and untenable. A judgment of a court having jurisdiction is binding alike upon parties and privies. If valid against Sauve it it is valid against Rochereau, who claims through Sauve and this court is bound under the act of Congress to see that the decrees of the Federal courts are not only given due weight as to form, but also as to *substance and effect.*

To give this court jurisdiction, some one of the questions raised in the judiciary act of 1789, and the amendments thereto, must appear to have been *raised in the State court, either in the pleadings*, or from the evidence in the course of trial; in the instructions asked for, or from the exceptions taken to the rulings of court.(2)

"The settled rule is that, where some one of the questions embraced in the judiciary act was raised *in the manner above stated*, and the *right, title* or exemption *was relied on*

(1) 2 Statutes, 298, Hughes v. Davis, 8 Maryland, 271.
(2) Parmelee v. Lawrence, 11 Wall., 38.

as a defense, and the decision of the State court was *against* such *right or title*, the jurisdiction of this court is complete." And it need not appear that the State court erred; *it is sufficient if it denied the right or title set up.*(1)

The written opinion of the judges of the State court, though required by statute to be filed with the papers, cannot be looked to as the foundation upon which this court will take or refuse jurisdiction.(2)

And though this rule has been, in a few instances, deviated from so far as to examine the opinion in certain cases from Louisiana, it has only occurred where the Federal question was not distinctly shown by the pleadings, and an examination of the entire record was necessary.

In the case at bar, Dupassier filed two pleas:

1st. That being the holder of an act of mortgage given by one Pierre Sauve, to secure the purchase price of the property in question, dated June 12, 1852, he instituted proceedings to foreclose the same in the United States Circuit Court, for the Eastern District of Louisiana, that the property had been sold under a decree in such cause, and the proceeds deposited in court for distribution, and *that Rochereau was a party to such proceeding which was still pending.*

2nd. That he purchased the property in question under a decree of foreclosure in said cause and holds possession under a deed from the United States Marshal, executed pursuant to a sale; that the plaintiff's sole claim is based on the fact that the mortgage on which the said decree

(1) Furman *v.* Nichols, 8 Wall., 56.

(2) Williams *v.* Norris, 12 Wheat., 117; Rector *v.* Ashley, 6 Wall., 148; Gibson *v.* Choteau, 8 Wall., 314.

was granted, had not been reinscribed within ten years from its first inscription because of the war, and the absence of the records of the Recorder's office, in St. Charles parish, and of the Recorder himself, which prevented the reinscription, though every effort was made to that end. (Rec., p. 16, 17.)

The first is a plea to the jurisdiction of the State court because the United States Circuit Court was at the time already seized of *exclusive jurisdiction over the subject matter of the suit*; and the second plea is an answer to the merits of the action, *setting up title derived through a decree and sale of the federal court.*

The judgment of the Supreme Court of Louisiana "was against the right or title set up," and claimed by Dupassier under these proceedings in the U. S. Circuit Court.

Its effect is to declare the decree and sale of the United States Court *void*, even in a *collateral proceeding* in a State Court. Under the pleadings, the *existence* and *validity* of Rochereau's mortgage, and Dupassier's title to the property, were the only questions at issue. If the proceedings in the United States Court were *valid*, Dupassier owned the property free from encumbrance, and Rochereau's *lien* upon the property was *extinguished* by the sale, and transferred to the money in the registry of that court.

These proceedings were set up in the pleadings, in technical and substantial terms, and fully proved in the State court. The decree of the Federal court and *the title* derived under it were *the sole grounds of defense.* The State court was compelled to *reject the defense*, and our title, in coming to the conclusion which it did.

The decree of the United States Court *established a first*

mortgage, in favor of Dupassier, on the property in question, and ordered a sale to satisfy it. The State court decided that such mortgage had been lost, and, in fact, had no existence at the date of such decree; and that the *purchaser got nothing at the sale.* This is the necessary legal effect of the decree of the State court.

Neither the reasons assigned, or language used by that court, can conceal this fact, or change the issues before that court. The existence of Dupassier's mortgage, and its rank and *priority*, including its inscription were matters pertaining exclusively to, and *were passed upon by the United States Court*, and the only mode in which that decision could be lawfully reviewed, was by a direct proceeding *in this court.* It cannot be collaterally attacked.(1)

Can a State court assume the right to sustain a collateral attack upon a final judgment of a Federal court, and deprive a purchaser under its decree of the benefits—*the fruits of such decree*, and he be without remedy?

Is the Federal judicial system so feeble and emasculated, as to afford its suitors *no remedy* for so high-handed an outrage?

Is the right of review, under the 25th section, such a *rose water* affair that, after depriving a man of valuable property purchased at judicial sale under authority of a Federal court, the State court can cut off all review by its opinion? On the contrary the uniform course of decision in this court has been that it is *immaterial* upon what ground the State court bases its decision in its opinion.

In the language of *Mr. Justice Miller*, in the recent case of *Delmos* v. *Insurance Company*,(2) where this court refused

(1) Tyler *v.* Defrees, 11 Wall., 331; Cooper *v.* Reynolds, 10 Wall., 308,
(2) 14 Wall., 668. Bridge Proprietors *v.* Hoboken, 1 Wall., 145; Jefferson Bank *v.* Skelley, 1 Black., 436.

to dismiss a writ of error to the Supreme Court of Louisiana: *** "*This court has always jealously asserted the right*, "when the question before it was the impairing of the "obligation of a contract by State legislation, *to ascertain* "*for itself* whether there was a contract to be impaired. "*If it was not so, the Constitution* could *always be evaded by* "*the State Court*, giving such construction to the contract, "or *such decision concerning its validity*, as to render the "power of this court of no avail in upholding it against "unconstitutional State legislation."

"The regularity and *effect* of the sale by the marshal will appear from the following provisions of the code of practice of Louisiana:

"The creditor holding a privilege or mortgage on property in Louisiana has the right to direct the seizure of the mortgaged property."(1)

This was done Dec. 6, 1863, in the present case, but United States soldiers drove the marshal away. (Rec., pp. 42–53.)

It will be observed there is no redemption from execution sales in Louisiana, but a certificate issues from the recorder of mortgages, before sale, showing all liens on the property seized, with the date of recording, which is read by the sheriff (or marshal) at the sale.(2)

"The purchaser pays into the sheriff's hands merely the surplus bid, above the mortgage."(3)

"But when the seizing creditor (as in this case) be a vendor, or has any *special privilege or special mortgage* on the property seized, which is *anterior* to or entitled to *a preference over other privileges, or special* mortgages on the

(1) Art. 648–724.
(2) Art. 678.
(3) Art. 679.

property, he may require a sale of the property seized at *any price*, although the purchase money be not sufficient to pay all mortgages or liens on the property."(1)

"And he may bid for the property the same as the debtor or any other person."(2)

The effect of this sale and deed from sheriff or marshal is *to release or cut off* all subsequent mortgages, whether the surplus after paying the seizing creditor's mortgage is sufficient to pay them or not. In other words, *the title is complete.*(3)

Any junior incumbrancer may buy the premises, and need only pay amount of first lien, retaining balance of purchase money on his own mortgage.(4)

"The sale on execution transfers the property of the thing to the purchaser as completely *as if the owner had sold it himself*; but it transfers only the rights of the debtor, such as they are."(5)

In order to arrive at *any decision* in the case, the Supreme Court of Louisiana was compelled to pass upon the *validity and existence of the sale*, as well as the decree under authority of the Federal Court, as alleged and proved. No pretense was made that any steps had been taken to reverse the judgment.

Indeed the reversal of the judgment could in no manner affect the title of Dupassier. (6)

(1) Art. 685.
(2) Art. 688.
(3) Art. 708, Passebon *v.* Preur, 1 La. An., 10; Theard *v.* Priest, 1 La. An., 16; Gomez *v.* Coureallé, 8 An., 304; Gillette *v.* Devanco, 10 An., 21; Wolf *v.* Lowry, 10 An., 273.
(4) Art., 636–707.
(5) Civil Code, Art. 2,598.
(6) Gray *v.* Brignardello, 1 Wall., 627 and cases cited.

The State court having denied the validity of our title, and the authority from which we derived it, and given judgment by which we lose both the property and the entire $62,000 *paid for it*, argument is unnecessary to show that the United States Court, in rendering the judgment or decree and confirming the sale, and the marshal in making sale under it to plaintiff in error, "*exercised an authority under the United States.*"

If our title had been a *patent*, signed by the President, it is conceded no question as to jurisdiction would exist. Such a patent is merely *evidence* of a grant from the United States authorized by law, and formally executed by the officers authorized and provided by law for that purpose. The marshal's deed is no less. The President can make no *valid* grant unless authorized by act of Congress. Neither can the marshal. The law creates both officers and invests them with their authority, and each acts wholly under such "authority." If, as counsel says, the marshal does not act under the authority of the United States, *what* authority does he represent? Whose officer is he? What law creates him? Of *what* is he marshal?

That such "authority" was "drawn in question," and "the decision" was "against its validity," in our case is unquestionable, it is apparent from the face of the record. No other question was made in the case. Dupassier either bought this property at this judicial sale, as he alleges, or he did not. *If he did, the sale cut off all subsequent mortgages, including this of Rochereau's.* It was Rochereau's duty, in order to save his mortgage, to have bid up the property at the marshal's sale to the amount of our mortgage, and bid it in himself, on his own mortgage. (1) He chose to stand by and see it sold for $15,000 more than the first mortgage. He still has his claim to this money in the

(1) C. P. La., Art. 688, 707.

Registry of the Circuit Court, and is estopped from denying the validity of the sale, having made himself a party to the proceedings.

In Rector *v.* Ashley, (1) this court refused to dismiss the writ of error though the court below, as in this case, based their opinion on the statute of limitations. *Mr. Justice Miller* uses the following language: "Leaving out the opinion of the State court there is nothing in the record before us to show that its decree *decided any other controverted proposition* than the *validity of the title* set up by Rector. This title was dependent upon the act of Congress, and the *decision was against the claim* set by him under that statute. It is therefore a proper case for a writ of error under the 25th section."

But this precise question was decided by this court in *Clements* v. *Berry*, (2) which arose on error to the Supreme Court of Tennessee in an action of replevin by Clements against Berry to recover certain personal property seized under a writ of *fieri facias* from the United States Circuit Court.

The late *Mr. Justice McLean* gives the opinion of the court as follows: "The jurisdiction of this court is the "first question to be considered. Plaintiff sets up a lien on "certain personal property under a judgment rendered by "the Circuit Court of U. S., for the middle District of "Tennessee. The defendant asserts a lien under a deed "of trust for the property from Berry, and the Supreme "Court of Tennessee held that the *lien of the deed* was "*paramount* to that *of the judgment.* This brings the case "within the 25th section, *as the decision was against the* "*right* asserted *by Clements under the authority* of the "U. S."

(1) 6 Wall., 147. (2) 11 How., 409.

This case is reported in 9 Humphrey (Tenn.), 312, et seq., where it will be observed the State court, in its opinion, *say* nothing about any *Federal question;* they do not allude directly to the "authority" of Clement's, under the United States court execution, but place their decision upon the general rule of priority of liens, etc., *and the State laws relative to registry of instruments of conveyance*, precisely as was done by the Supreme Court of Louisiana in the case under consideration.

The learned counsel, in his brief, uses this language: "From the articles* from the Code of Practice of Louisiana, it is apparent that in an hypothecary action no question of title is involved." (P. 7.)

Let us see: "The hypothecary action *is a real action*, which the purchaser brings *against the property* which has been hypothecated to him by his debtor, in order to have it seized and sold for the payment of his debt."(1) A "*real action*" is one by which a person seeks to recover *his property*, which is in the possession of another,(2) and the Louisiana code defines it as, "that which relates to *claims* on immovable property, or to the immovable rights, to which they are subjected.(3)

Besides, the present action will not bear criticism by the citations from the code. 1st. The creditor did not declare on oath in his petition. 2d. He did not pray for a seizure of the property and its sale for this debt, but asked a personal judgment against Dupassier. (Rec., p. 2–3.) 3d. It is averred that Dupassier has taken and holds possession of the property as owner. And from the nature of the case, a hypothecary action cannot be maintained against a *purchaser at judicial sale*. Only the

(1) C. P., Art. 61.
(2) 3 Bouvier's Law Dict., 412, Tit. Real Action.
(3) C. P. La., Art. 4.

voluntary grantees of the mortgagor are liable to it. Any other rule would lead to endless litigation and confusion, and no person could be induced to buy at a judicial sale, if he was to be subjected to suit attacking his title collaterally by every person who had ever held a claim upon the property.

This case, as shown by the pleadings, is more correctly described as the "petitory action," described in the same code. "The petitory action is that by which he who has the property of a real estate, or of *a right upon, or growing out of it*, proceeds against *the person having the possession*, in order to obtain the possession of the immovable property, or the enjoyment of the rights upon it to which he is entitled.(1)

The purchaser is bound for nothing beyond the price of the adjudication, and if after paying the suing creditor there remains nothing more due to *discharge the mortgages subsequent to that of the suing creditor*, the sheriff (or marshal) shall give him a *release from these mortgages.*(2)

But it is wholly immaterial what name the action bears. The issues made, the *matters adjudged*, and their legal effect, are the only pertinent matters of inquiry in this court when its jurisdiction is questioned.

The questions raised by counsel for defendant upon this motion can not be considered, since the decision in Clements *v.* Berry, as open for discussion in this court. No case *can* arise where a greater necessity exists for the exercise of the jurisdiction so wisely conferred upon this court by the 25th section of the Judiciary Act, which Congress has so recently found it necessary to enlarge.(3)

(1) C. P La, Art 5.
(2) C. P., Art. 708.
(3) 14 Stat., p. 385, § 2.

Nor can a case be found which more strongly appeals to our sense of justice than the one disclosed by this record.

The motion to dismiss the writ of error should be denied.

Respectfully submitted.

A. C. STORY,
For Plaintiff in Error.

Supreme Court of the United States.

No. 359.

EDWARD DUPASSEUR,
Plaintiff in Error,
vs.
ALBIN ROCHEREAU,
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Error to Supreme Court of Louisiana.

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STATEMENT OF THE CASE.

On June 12th, 1852, Charles Anderson Jacobs executed an act of sale before Theo. Guyol, notary, of a certain plantation and slaves, situate in St. Charles Parish, Louisiana, to one Pierre Sauve, retaining in the same act the vendor's lien and special mortgage, to secure the sum of $133,120, a part of the purchase price. This act made before a notary and two witnesses, constituted an "authentic act" under the laws of Louisiana, "*importing a confession of judgment.*" It was properly inscribed in the office of mortgages for said parish, on the 8th day of

July, 1852. (See certificate of the Recorder of Mort gages, Record, page 69.)

Subsequently, on the 28th day of February, 1858, the said Pierre Sauve executed a *second mortgage*, covering the same plantation, to the defendant in error, to secure the further sum of $35,000, with interest. This mortgage was also in authentic form, and contained the following clause: "According to the annexed certificate of the "recorder of mortgages of said parish of St. Charles, the "said plantation and slaves are free from incumbrance, "with the exception of the following, to wit: 1st. The "mortgage by the said Sauve in favor of C. A. Jacobs, "by act in this office on the 12th June, 1852, to secure "the payment of $133,120, now reduced according to "the records of said recorder to $55,120, of which "$26,000 have been paid, as the said Sauve hereby "declares." (Record, page 14.)

On October 15th, 1858, Jacobs brought suit in the 3rd Judicial District Court of La., on the $29,120 note, described and secured in said first mortgage, and the court ordered the money then due to be paid into court. (Record, page 45 to 51.)

On the 15th day of April, 1861, the Jacobs, or first mortgage, was transferred by authentic act before Guyol, notary, to Edward Dupasseur & Co., who had taken up or purchased the notes from Jacobs, and given one year's further time to Sauve, under a stipulation that the mortgage should remain in full force. (Record, pages 50 and 51.)

On December 1st, 1863, Dupasseur & Co. brought suit against Pierre Sauve upon these notes, in the United States Circuit Court for the District of Louisiana, praying for a sequestration, and sale of said plantation under the Jacobs or first mortgage, to pay and satisfy the sum of $37,001 99-100 then due, with interest from April 5th, 1862. (Record, page 39.)

The notes and mortgage and proceedings had thereon, in the 3rd District Court, were annexed and made a part of the petition in the United States Circuit Court.

On the same day of the filing of suit, a writ of sequestration issued therein, directing the marshal to take possession of the mortgaged property; but the marshal made return that he was prevented from executing the writ by an armed military force of the United States. (Record, page 53.)

Being prevented from going on with the suit, Dupasseur & Co. allowed the case to rest until the war ended; and on the 23rd day of February, 1866, final judgment was rendered by the Circuit Court for the amount claimed, with vendor's lien and privilege upon the property in question, as provided in the mortgage sued on. (Record, pages 53 and 54.)

A writ of *fieri facias* was issued, pursuant to this judgment, under which the said plantation was sold by the marshal, May 6th, 1866, to Edward Dupasseur, the present plaintiff in error, for $64,151. The purchaser retained the amount of said judgment in his hands, and paid the surplus, amounting to $15,046.05, into the hands of the marshal. (Record, pages 55 and 56.)

The sale being duly reported to court, was confirmed, and the surplus ordered to be paid into the registry of the court. (Record, page 56.)

Disregarding the foreclosure and sale under the first mortgage, Albin Rochereau, defendant in error, brought suit against the said Edward Dupasseur, the purchaser at the marshal's sale, in the 6th District Court of New Orleans, seeking to subject the property to the payment of his *second mortgage.* A copy of the second mortgage was filed, as the basis of his suit, and it contained *a recital of the first mortgage* in the words given above. (Record, pages 11 to 15.)

As a defense to that suit, the plaintiff in error pleaded that he had purchased the property in question at the marshal's sale under the judgment of the United States Circuit Court on the first mortgage aforesaid, and paid the surplus of the price into the registry of the court, and that the defendant in error had intervened in that court and claimed the surplus under his second mortgage; that the sale aforesaid conveyed to him the property free from all mortgages and incumbrances, and *especially* free from the alleged mortgage of the defendant in error; and that the whole proceeds of said sale were absorbed to satisfy the first mortgage, except $15,046.05, which was still in the marshal's hands, subject to the payment of Rochereau's claim *pro tanto;* that the sole foundation of Rochereau's pretensions was the fact that the special mortgage (Jacobs') had not been reinscribed within ten years from the first inscription, on account of the existence of the war, and the disturbed condition of

the country. That every effort had been used to procure the reinscription of said mortgage before the expiration of 10 years, but without effect, because the records of the mortgage office had been removed, and the Recorder himself had left the parish. (Record, pages 17 and 18.)

The marshal's deed was annexed and made a part of the answer.

The case was submitted in the lower court, on the following evidence on part of the defendant in error:

1st. The act of mortgage from Pierre Sauve to Albin Rochereau, dated 28th February, 1858, and the notes secured by it. (Record, pages 2 to 14.)

2d. Record No. 18001 of the 6th District Court of New Orleans, being a record of a suit by Rochereau against Sauve on his said mortgage. (Record, pages 24 to 30.)

3d. A certificate of the Secretary of State, showing the appointment of Kramer as Recorder of St. Charles Parish, Aug. 16, 1864, and the appointment of a successor, June 23, 1865.

4th. Testimony of Baudoin, tending to show that Kramer took possession of his said office in September, 1864, and that one St. Martin was Recorder up to October, 1862, though he only had access to his office up to April, 1862. (Record, pages 36 and 37.)

5th. Testimony of St. Martin, tending to show that he was Recorder up to July, 1864, though he did not act as such after May, 1862; that the said Jacobs mortgage

was presented to him for reinscription in September or October, 1862, and again in March and April, 1863; but that it *could not be inscribed* because the Court House was locked up, and the key in possession of the sheriff, who was absent from the parish; and that he gave Dupasseur's agent certificates to that effect. (Record, pages 37 and 38.)

The counsel for Dupasseur, plaintiff in error, then offered the following evidence:

1st. United States Circuit Court record, in the case of Dupasseur & Co. *vs.* Sauve, No. 3395, on the docket of that court. (See Petition, Record, p. 39; Judgment, p. 53; Writ of Fi. Fa., p. 54; Return on same, p. 55; Marshal's Deed, p. 30; Mortgage Certificate, p. 57.)

2d. Evidence of Bidaud, showing that from May, 1862, to December, 1862, a pass to go to St. Charles Parish to have the Jacobs mortgage reinscribed, could not be obtained from General B. F. Butler; and the evidence of P. Bidaud, showing that when he went to St. Charles Parish, the Judge, Sheriff, Recorder, and all other officers, were absent, and he could not get the mortgage recorded. (Record, page 24.)

3d. Evidence of C. Roselius, attorney for Dupasseur & Co., showing that passes could not be procured until December, 1862. (Record, page 25.)

4th. Three protest entries made by St. Martin in the mortgage books, showing Dupasseur's application to have the mortgage recorded, and the reason why it could not be. (Record, page 34.)

5th. Certificate of the Recorder, showing reinscription of Jacobs mortgage, May 15, 1865. (Record, page 34.)

6th. Certificate of the Clerk of the U. S. Circuit Court, showing a balance in the registry of $9,651.15, surplus from marshal's sale in the case (Record, page 60); also, the original petition filed by Dupasseur & Co. against Sauve for foreclosure of the first mortgage, filed Dec. 1, 1863 (Record, page 39); and the record of the suit in the 3d District Court, No. 1339, entitled "G. R. Jacobs *vs.* Pierre Sauve," which was made a part of such petition (Record, pages 44 to 50).

This is, in brief, all the evidence offered by both parties in the court *aquo*. It was all offered and received without objection as to form or substance. The case was prosecuted in the State Court squarely on the merits, and the judgment was in favor of the pretensions of the defendant in error *against the validity of the proceedings in the United States Circuit Court*, and subjected the property in question to the payment of the second mortgage. (Record, page 61.)

Appeal was taken by the plaintiff in error from this judgment; but the Supreme Court of Louisiana, holding *that the federal court decree and the sale made under it were void* of effect to sustain the plea made by this plaintiff, affirmed the judgment on the 23rd day of February, 1870. (Record, page 74.)

Rochereau v. *Dupasseur*, 22 La. An., 402.

It is this judgment of the Supreme Court of Louisiana that this court is asked to review.

ASSIGNMENT OF ERRORS.

1st. The Supreme Court of Louisiana erred in deciding that the lien and effect of the mortgage from Pierre Sauve to Charles Anderson Jacobs, dated 12th June, 1862, had been lost for want of reinscription within ten years from its date, at the time the marshal sold the property under a decree on the mortgage in the United States Circuit Court.

2nd. The said court erred in deciding that the recital of the *first* in the subsequent mortgage of Rochereau, did not relieve the holder of such first mortgage from the necessity of re-inscribing the same within ten years, to preserve its rank, as against the subsequent mortgage.

3rd. That said court erred in deciding that the pendency of the suit in the 3rd District Court, and the judgment rendered therein in the suit of G. R. Jacobs *v.* Pierre Sauve, filed Oct'r, 1868, and the subsequent suit of Edward Dupasseur & Co. *v.* Pierre Sauve on the same mortgage, filed December 1st, 1863, in the United States Circuit Court, did not form *lis pendens* and operate as a continuation of the equitable lien under the mortgage of June 12th, 1852, to the date of the marshal's sale.

4th. The said court erred in deciding *that the decree of the federal Circuit Court, and the sale of the premises by the marshal by virtue thereof to the plaintiff in error, under the said first mortgage, did not extinguish the subsequent mortgage*

to Albin Rochereau, and in overruling the plea to that effect made by Edward Dupasseur, upon the record.

5th. The said court erred in deciding that the course of prescription against said mortgage was not interrupted during the period of the war, and while the re-inscription thereof was not possible.

6th. *The court erred in refusing to give to the decree of the U. S. Circuit Court, and the sale made thereunder, the same effect which such decree and sale would have in the federal courts.*

7th. By General Order No. 91 of Major General Banks, dated 9 Nov., 1862, all sales, judicial and private, of property west of the Mississippi river, including that in question, was forbidden, and the property declared sequestered. The State court held that this order was no protection to Dupasseur, and in effect decided said order invalid, and denied immunities claimed by him thereunder. Such ruling was error.

ARGUMENT.

The judgment complained of, is the result of these errors, and the main question, which embraces all these incidental matters, is, Did the sale made by the marshal under the decree of the Circuit Court on the first mortgage convey the property to plaintiff in error, and extinguish the second or subsequent mortgage?

It is well settled by the law of Louisiana, that a sale under a judgment on a first mortgage *extinguishes* all subsequent liens, mortgages and privileges on the same property: *Provided*, the first mortgage or lien has not been lost *before the sale* for want of re-inscription as required by the civil code. This is the *consequence* of the sale by operation of law, *whether the holders of such subsequent mortgages and liens are parties to the decree of sale or not.* The two following articles of the Louisiana Code of Practice, regulating sales upon execution, prescribe such effect:

Article 707. "If the suing creditor herein has a privi-"lege or special mortgage, which is preferable or anterior "to the mortgages existing on the property sold, the "sheriff shall require of the purchaser the payment of "the price, to the amount of the privilege, or special "mortgage of the seizing creditor, and the purchaser "shall apply the *surplus* of the price, if there be any, to

"paying the special mortgages existing on the property "*subsequent to that of the suing creditor.*"

Article 708. "The purchaser is bound for nothing "beyond the price of his adjudication, after paying the "suing creditor as directed in the preceding article; *if* "*there remain nothing more due to discharge the mortgages* "*subsequent to that of the suing creditor, the sheriff shall give* "*him a release from these mortgages.*"

In a word, subsequent mortgages are extinguished by such sale except so far as there may be a surplus of the price over and above what is required to satisfy the first mortgage lien.

Passbon v. *Prieurr*, 1 La., p. 10.
Theard v. *Priest*, Ibid. p. 16.
Gomez v. *Courcall*, 8 La. An., p. 304.
Wolf v. *Lowery*, 10 La. An., p. 273.
Gillette v. *Deranco*, 10 La. An., p. 21.

Though the law required Dupasseur, to retain the surplus of the price bid, over and above what was required to satisfy the first mortgage of Dupasseur & Co., the Judge of the Circuit Court compelled him to pay it over to the marshal; and the amount, $15,046.05 (Record, pages 57 and 60), was subsequently deposited by the marshal in the registry of the court, where it now remains for the account of the holder of the subsequent mortgages. But as no question in regard to this surplus is involved in this suit, this fact is referred to merely to show that the purchaser at the marshal's sale has *strictly complied* with his obligations under the articles of the Code of Practice. The suit of Rochereau in the State

Court *entirely ignores* the marshal's sale to Dupasseur, and proceeds on the theory that *he took nothing* by that sale as against the pretensions of the defendant in error, under his second mortgage. The State Court sustained this theory, and decided that the first mortgage had no existence at the date of the marshal's sale, and, as a consequence, the proceedings in U. S. Court were void, and therefore the subsequent mortgage was not extinguished, but, on the contrary, had superseded it. Their decision was based on the interpretation given to the following article of the Civil Code of Louisiana (see Code of 1870), article 3369 (old Code, 3383):

"The registry preserves the evidence of mortgages "during ten years, reckoning from the day of its date; "its effect ceases, even against the contracting parties, if "the inscription has not been renewed before the expira- "tion of this time, in the manner in which they were "first made." * * * * *

And the State Court held that under this article of the Code, recital of the Jacobs mortgage in the subsequent mortgage of Rochereau, did not do away with the necessity of its reinscription. This decision operated to defeat the title acquired by the plaintiff in error under the Circuit Court proceedings, and deprived him of all the legitimate fruits of his purchase. But this honorable court, in the case of *Patterson* v. *De La Ronde*, 8 Wallace, 292, has refused to follow such an interpretation of the above article of the Code.

The court in that case, after a most thorough and exhaustive examination of the subject, and interpretation

of the article in question, both in the English and French languages, and a close analysis of the civil and common law authorities, announce and adhere to the old rule, "that *actual notice is equivalent to registry*, and that the *recital of a first mortgage* in the second, does away with all necessity of a reinscription in order to preserve its rank and priority." As remarked by Mr. Justice FIELD in that case, "Such is the law of Louisiana, as expounded "by the decisions of her highest court. *Shepard* v. *Or-*"*leans Cotton Press*, 2 La. An., 113.

"The doctrine is now well settled, that actual knowl-"edge of an existing mortgage, or title, is equivalent to "notice resulting from the registry."

Robinet v. *Compton*, 2 La. An., 854.
Planters' Bank v. *Allard*, 8 Martin, N.S., 136.
Bell v. *How*, 8 Martin, N.S., 283.
Rochal v. *Normond*, 6 Robinson, 88.
Swan v. *Moore*, 23 La. An., 833.

But there never was a prescription of our mortgage. The court say, in *Patterson* v. *De La Ronde* (p. 301): "Prescription of the mortgage and vendor's privilege "*did not follow* from the *omission to reinscribe* the act of "sale. *From its nature, prescription could not have begun to* "*run until the debt secured had matured.*"

The debt in the case under consideration fell due June 15, 1857. Prescription for non-reinscription would not, therefore, be complete against it *until June* 15, 1867, and the sale by the marshal was in May, 1866, more than a year before our time expired, and more than a year *after* the actual reinscription by Dupasseur.

That the filing of the suit December 1, 1863, to enforce the first mortgage, operated as *lis pendens* against all the world, and held the property subject to the mortgage *lien* sued on continuously, intact, from that time until the day of sale, and therefore no reinscription was necessary, seems too well settled to require authority. This is the rule of the common law, and it governs as to the effect of *judicial proceedings* in all Federal Courts, overriding any State rules.

Even upon the hypothesis of defendant that prescription begins to run from the date of registry, our suit was in time. Our mortgage was first recorded July 8, 1852. The record shows conclusively that from May, 1862, continuously to July, 1864—a period of two years and two months—*no re-inscription could possibly be made*, all business of that character being interrupted by the absence of the recorder, the presence of armed military forces, and the existence of *actual war*. Several futile efforts, by means of a pass from the military authorities, to accomplish the re-inscription of the mortgage, were made by Dupasseur, before and after filing suit, and the process of the federal court, requiring a seizure of the property, could not be executed for the same reason, *i.e.*, the presence of armed military forces. What more could Dupasseur do to preserve his rights?

What effect would have resulted from the copying of this mortgage into books which were kept locked up in a court-house for four years, and the officer in charge absent from the country?

And yet for the non-performance of this *impossible act*,

which was fully considered by the federal court in pronouncing the judgment under which we claim, a State court has gravely and with owl-like dignity, assumed to decide that a judgment, execution and sale, in the United States court, and a title acquired by Dupasseur thereunder good, complete and unimpeachable in all respects, under the settled jurisprudence of the United States, was absolutely *void*, and this too in a collateral proceeding.

A title derived under an authority of the United States—viz., through the actions of the officers of one of the Federal Courts—complete and perfect in every respect, has been thus nullified and destroyed by the decision of a State Court.

It is the practice of the Federal Courts to interpret the *effect* to be given to any right or title derived under an authority of the United States, according to the Federal jurisprudence; and the case at bar comes directly within the purview of the statute granting revisory jurisdiction over the judgments of the State Courts, where such judgment is against the validity of the title set up or immunity claimed.

The theory of defendants in error, that the decision complained of does not destroy the *title* derived by the plaintiff in error through the Circuit Court proceedings, is advanced under the mistaken idea that so long as the State Court does not *in terms avoid such title* for want of form merely, its decisions can not be revised here. Titles derive their validity more from the *authority* from which they emanate, than from their form. In this case the State Court went behind the title set up by the plain-

tiff in error, and denied to the Federal Court proceedings the *effect* which should have been given them, and without which they are valueless. The *existence* and validity of the Jacobs mortgage, the *effects* of its inscription, and its *rank* and *priority*, were all questions for decision in, and were *established* by *the judgment* of, the U. S. Circuit Court. The decision of the State Court *utterly destroys* and *nullifies* the effect of this judgment, and defeats the title acquired under its authority and protection.

All mortgages in Louisiana contain a clause or stipulation not to alienate or encumber the property to the prejudice of the mortgage act, and as a consequence, the mortgagee, in a suit to foreclose, is not bound to include any party in interest other than the mortgagor. The proceeding to foreclose and sell, therefore, is essentially *in rem* under the laws of Louisiana. By the laws of that State, no act of sale can be passed without annexing a certificate from the mortgage office showing the liens existing upon the property. Those who purchase or acquire subsequent rights in mortgaged property, are *presumed* to know the incumbrances against it; and they can not claim to be in any better condition than those through whom they claim. The stipulation, "*de non alienando*," runs with the property, and is conclusive upon all subsequent owners or incumbrancers.

Staresborouyh v. *McCall*, 4 La. An., 324.

The effect of this rule of procedure is, that in contemplation of law, the holders of liens and titles acquired subsequent to the mortgage of the suing creditor, are

parties defendant in the proceeding, though not named in the pleadings, or served with process. They are bound by the judgment and the sale thereunder.

The effect of the sale depends upon the *date of the mortgage* as *established by the decree of the court.* In the case at bar, the Circuit Court found in favor of Dupasseur & Co., decreeing them a vendor's lien and privilege according to the terms of the mortgage sued on. The necessary consequence of a sale under this decree was to *extinguish* all subsequent liens on the property, including that of Rochereau. And the finding of the Circuit Court was correct, according to the interpretation given to the article of the Code of La., 3333, by *this court* in *Patterson* v. *De La Ronde.*

The decision of the Supreme Court of Louisiana, under review, annulled and destroyed this Circuit Court decision and finding; stripped it of its legitimate effect, and deprived Dupasseur of the fruits of his purchase.

On the 9th of November, 1862, Major General Banks, then in command of the Department of the Gulf, issued the following general order, or proclamation, numbered 91:

* * * "I. *All property within the district* to be "known as the District of Lafourche, *is hereby sequestered,* "and *all sales and transfers* thereof *are forbidden, and will* "*be held invalid.*

"II. The District of Lafourche will comprise all the "territory of the State of Louisiana lying west of the

"Mississippi river, *except* the parishes of Plaquemine "and Jefferson." * * *

General Order No. 18, January 8, 1863, also provides:

* * * "I. The foreclosure of mortgages, or in- "struments that are such in effect, and sales under fore- "closure, as against loyal citizens, having interest in the "subject matter, whether as owner, mortgagee, or other- "wise, are prohibited.

"II. * * * Provided, however, that this exemp- "tion shall not be effectual as to debts or obligations "incurred *subsequent* to the date of this order, which "shall have remained uncanceled for six months."

General Orders Department of the Gulf, 1862-3-4.

The record shows the plantation in question to be situate in the Parish of St. Charles, and this court will take judicial notice that its geographical situation is within the military district of Lafourche. These orders were the expression of the military or *sovereign will*, as statutes are of the legislative will, and both are of binding force, and must be obeyed until repealed or changed by competent authority.

These general orders, or proclamations, were required by law to be printed, bound, and preserved, and duplicates reported to the War Department.

U. S. Army Regulations 1861, Arts. 87, 441–448.

They constituted the *supreme* law within the jurisdiction of the commanding officer, and the courts will take judicial notice of them.

DeHart's Military Law, p. 17.
The Venice, 2 Wall., 259.
The Ouachita Cotton, 6 Wall., 431.
Chief Justice CHASE, in 1 Am. Law Review, 745.
State v. *Heath*, 20 La. Anl., 520.
The Grapeshot, 9 Wall., 131.
CLIFFORD, J., in *Hanger* v. *Abbott*, 6 Wall., 541.

"Where our own government has promulgated any "ordinance of a public nature as authentic, that may *of* "*itself* be sufficient evidence of the actual existence and "terms of such law and ordinance."

1 *Greenleaf Ev.*, §§ 41, 42.

The acts of the military or naval officers of the United States in pursuance of the regulations of the service, partake of a *judicial character.*

Wilkes v. *Densman*, 8 How., 89.

In the case of *Burke* v. *Tregre and Miltenberger*, decided at the present term, the existence and validity of these identical proclamations, or orders, of General Banks was *recognized by this court and given effect.*

As the opinion has not been published at this time, it is impossible to do more than call attention to that case as bearing upon the question under consideration.

If these views are correct, a complete answer is furnished to the position of the Supreme Court of the State, as announced in their opinion on the question of the prescription of the Dupasseur mortgage by non-reinscription, and *another federal question* arises.

Being prohibited by *United States military authority*—then the law of the land—from taking any steps to protect and perpetuate his lien, or to foreclose his mertgage, and *this property being actually sequestered* and in the possession of the military, so that process from the United States court could not be executed against it (p. 58 Record), *such authority constitutes a protection to him and his rights*, and interrupts prescription.

"The subjugation of New Orleans and the restoration "of the national authority there are regarded as having "become complete upon the 6th of May, 1862. *From "that time its citizens were clothed with the same rights of "property*, and were subject to the same inhibitions and "disabilities as to *commercial intercourse* with the territory "declared to be in insurrection *as the inhabitants of the "loyal States.*"

The Ouachita Cotton, 6 Wall., 531.
The Venice, 2 Wall., 259.

"Military occupation must be actual, substantial, com-"plete and permanent. Being such it *draws after it the "full measure of protection to persons and property* consistent "with a necessary subjection to military government."

The Venice, 2 Wall., 277.

That prescription was *in fact* interrupted by, and did not run during the war, has been repeatedly and uniformly decided, and is no longer an open question in this court.

The decision of the State court under review, ignores this principle, *and denies the validity of this "authority" and*

"*immunity*," claimed and relied upon by Dupasseur, and substantially set up in his plea in the court below, viz.: that the existence of the civil war, and the orders of the military, prevented the re-inscription of his mortgage, and protected his rights under the mortgage during the period mentioned.

These orders, as we have seen, being *public law*, and taken notice of by the court, entitled us to the judgment of the State court.

That tribunal having decided them *invalid*; upon this ground alone, we have a right to maintain this writ of error.

The federal question is twice squarely presented. 1st. Upon Dupasseur's title and rights in the property in question, derived through the judgment and proceedings had in the United States Circuit Court for Louisiana; 2d. Upon the *immunity* and *protection* granted to him by the United States government, under the orders of General Banks, during the existence of the late civil war, by which a re-inscription of his mortgage was *rendered impossible*. The State court having denied the validity of both these rights thus set up and claimed by the plaintiff in error, the jurisdiction of this court is apparent upon both grounds.

No stronger case than the one disclosed in this record could be presented for the exercise of the revisory power granted to this court by the judiciary act.

It has been the uniform practice of this court to take jurisdiction of all cases where the State courts have

adjudged adversely to a right or title derived from an authority exercised under the laws of the United States; and this on the broad ground that the federal courts are the *sole judges* of the *effect* to be given to any act done or right acquired under such laws. *This jurisdiction is necessary* to insure the proper exercise of the powers of the government, and to preserve the uniformity of the federal judicial system; so that a right or title derived from an authority of the United States, good for all purposes in a federal court, should not be adjudged invalid in a State court, and the injured party left without remedy.

The jurisdiction of this court in cases involving the effect to be given to sales made under authority of the admiralty courts; and federal decrees of confiscation;—questions identical with those involved in this case—has never been doubted or even questioned.

In *Buck* v. *Colbarth*, 3 Wallace, 332, the court held that where a marshal pleads a writ of a proper federal court, as a defense to a suit against him in a State court, and the judgment of the State court is *against the plea*, this court has jurisdiction under the 25th section of the judiciary act.

In *Green* v. *Van Buskirk*, 8 Wallace, 308, this court took jurisdiction in a case where the courts of the State of New York refused to give the record of a suit in Illinois the effect claimed by the defendant in his plea, pursuant to the laws of Illinois.

Rector v. *Ashley*, 6 Wall., 147, and *Clements* v. *Berry*, 11

How., 409, are also strongly in point and decisive of the present case.

It is respectfully submitted that the plaintiff is not only entitled to have the judgment complained of reversed; but that the jurisdiction of this court to afford relief, by ordering restitution of the property to Dupasseur, with damages for its wrongful taking and detention, is complete and ample, and ought to be exercised.

Respectfully submitted.

A. C. STORY,
Of Counsel for Plaintiff in Error.